

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

EVANSTON INSURANCE COMPANY ,

Plaintiff,

V.

**FRANK WINSTON CRUM INSURANCE
COMPANY,**

Defendant.

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CIVIL ACTION NO. 5:17-cv-652

ORIGINAL COMPLAINT FOR DECLARATORY RELIEF

TO THE HONORABLE JUDGE OF THIS COURT:

COMES NOW, Plaintiff Evanston Insurance Company, as successor by merger to Essex Insurance Company (“Evanston”), and files this, its Original Complaint for Declaratory Relief against Frank Winston Crum Insurance Company (“FWC”) and would respectfully show the Court the following:

**I.
PARTIES**

1. Plaintiff Evanston Insurance Company, as successor by merger to Essex Insurance Company, is a corporation organized under the laws of the State of Illinois with its principal place of business in Glen Allen, Virginia.

2. Defendant Frank Winston Crum Insurance Company is a corporation organized under the laws of the State of Florida with its principal place of business in Clearwater, Florida. FWC may be served through its registered agent for service of process, CT Corporation System, 350 North St. Paul Street, Suite 2900, Dallas, Texas 75201-4234.

II. JURISDICTION

3. The jurisdiction of this Court over the subject matter of this action is predicated on Fed. R. Civ. P. 57 and 28 U.S.C. §2201. This matter is properly before this Honorable Court under 28 U.S.C. §2201 as complete diversity exists between the parties, and the amount in controversy exceeds \$75,000 exclusive of interest and costs.

III. VENUE

4. Venue is proper in this matter pursuant to 28 U.S.C. §1391 as the contracts for insurance were issued to the insured in this district, and the underlying lawsuit giving rise to this dispute is pending in this district, thus a substantial part of the events or omissions giving rise to the claims occurred in this district, and within this division of this district.

IV. BACKGROUND FACTS

5. This dispute involves the defense of GEMM Construction, Inc. (“GEMM”) arising out of work performed by GEMM on a single-family house located at 19527 Terra Mont in San Antonio, Texas. The plaintiffs in the underlying lawsuit are Andres and Ethelvina Perez. The Perezes sued the general contractor who built their house, Guadalupe J. Nunez, Jr. (“Nunez”), in a lawsuit styled *Andres and Ethelvina Perez v. Guadalupe J. Nunez, Jr. a/k/a Lupe Nunez d/b/a Nunez Signature Homes, et. al.*, Cause No. 2015-CI-13193 (“the Perez Lawsuit”).

6. The Perez Plaintiffs allege in their Second Amended Petition that the house as delivered by Nunez contained numerous construction defects, most significantly with the plumbing, the roofing and the framing. The Plaintiffs allege that they seek to recover damages between \$200,000 and \$1,000,000.

11. Upon information and belief, FWC received notice of the lawsuit and the claims against GEMM in 2016. On or about August 26, 2016, counsel for Evanston wrote to FWC by way of the third-party adjuster FWC had hired to handle the claim, demanding that FWC participate in the defense of GEMM. Despite these requests, FWC has refused to participate in GEMM's defense.

**VI.
CAUSE OF ACTION – DECLARATORY RELIEF**

12. Evanston re-alleges and incorporates by reference the allegations contained above in paragraphs 1- 11.

13. Evanston seeks a declaration of this Court, pursuant to 28 U.S.C. §§2201 and 2202, as an actual controversy exists between the parties regarding the rights and obligations of Evanston and FWC under those insurance policies issued to GEMM that respond to the claim asserted in the lawsuit.

14. Evanston seeks a declaration from this Court that FWC has a duty to defend GEMM against the claims asserted in the lawsuit.

15. Evanston also seeks a declaration from this Court that FWC has a duty to indemnify GEMM in the event that GEMM is held liable to Nunez for performing defective work on the Perez house.

**VII.
CAUSE OF ACTION – BREACH OF CONTRACT**

16. Evanston re-alleges and incorporates by reference the allegations contained above in paragraphs 1- 15.

17. Evanston has retained counsel to defend GEMM against the claims asserted in the Perez Lawsuit. Despite requests to do so, FWC has refused to provide a defense to GEMM

against the claims asserted in the Perez Lawsuit, in breach of its obligations under the FWC Policy.

18. Evanston is contractually and equitably subrogated to GEMM's rights under its policy with FWC to the extent of Evanston's payments on behalf of GEMM.

19. Evanston seeks to recover from FWC fifty percent (50%) of the attorneys' fees and expenses that it has incurred and that it will continue to incur defending GEMM against the claims asserted in the Perez Lawsuit.

**VIII.
ATTORNEYS' FEES**

20. Evanston has been forced to hire the undersigned attorneys to prosecute this claim. Evanston requests an award of its reasonable and necessary attorneys' fees pursuant to Chapter 38 of the Texas Civil Practices and Remedies Code arising out of FWC's breach of its policy with GEMM.

**IX.
REQUEST FOR JURY TRIAL**

21. Evanston requests a jury trial on all issues so triable.

**X.
PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Evanston Insurance Company respectfully prays that Defendant be cited to appear and answer this lawsuit, and that this Court enter a judgment against Defendant for the following:

1. A declaration that Frank Winston Crum Insurance Company has a duty to defend GEMM against the claims in the Perez Lawsuit;
2. Damages to be awarded in favor of Evanston for Frank Winston Crum Insurance Company's share of defense costs incurred by Evanston as a result of Frank Winston Crum

Insurance Company's breach of its duty to defend GEMM against the claims asserted in the Perez Lawsuit.


3. A declaration that Frank Winston Crum Insurance Company has a duty to indemnify GEMM in the event that GEMM is held liable to Nunez.

4. Evanston is entitled to recover for its costs, expenses and attorneys' fees in pursuing this action for coverage from Frank Winston Crum Insurance Company.

5. All other relief to which Evanston is entitled.

Respectfully submitted,

THOMPSON, COE, COUSINS & IRONS, L.L.P.

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